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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

ABRAHAM J. SEVILLA, et al,

Plaintiffs and Appellants,

v.

JPMORGAN CHASE BANK, N.A., et al.

Defendants and Respondents.

No. A150806

(San Mateo County Super. Ct.

No. CIV528821)

Plaintiffs Abraham J. Sevilla, Aminta H. Sevilla and Antonio Uribe (collectively, plaintiffs) appeal from the trial court's grant of summary judgment to defendants JPMorgan Chase Bank, N.A. (Chase) and EMC Mortgage, LLC (EMC) (collectively, defendants) on plaintiffs' breach of contract cause of action and various other claims. These claims arise out of a dispute over the mortgage payment terms of a permanent mortgage loan modification defendants offered plaintiffs pursuant to the Home Affordable Mortgage Program (HAMP). All five of plaintiffs' causes of action rest on the premise that defendants informed plaintiffs they would receive a permanent loan modification with a monthly payment amount similar to that required under their temporary payment plan (TPP) so long as they made the temporary payments as requested. Plaintiffs alleged they made those payments, but defendants breached the TPP agreement, and did not fulfill certain oral promises, by failing to offer them a permanent loan modification with payments similar in amount to their TPP payments.

Defendants' summary judgment motion rested on evidence showing that they based the TPP amount on a substantially understated gross monthly income figure for plaintiffs, that they made a permanent loan modification offer with higher payments that were based on the higher income for plaintiffs that defendants had verified by reviewing various documentation, and that under the TPP contract and the law governing HAMP this fulfilled their obligation to plaintiffs.

Plaintiffs opposed defendants' motion, claiming they had provided documentation to defendants (such as paystubs, bank records and W-2s) prior to defendants' determination of the TPP, and that such documentation accurately reflected their income. Because the income reflected by that documentation did not change thereafter, plaintiffs contended, the permanent loan modification offer had to include a payment amount similar to the TPP payment amount.

Implicit in plaintiffs' argument, both in opposition to the motion and on appeal, is the proposition that once having received specific documentation that accurately reflected plaintiffs' income prior to setting the TPP, defendants were obligated to set the TPP based on that documentation and could not rely on other statements plaintiffs made to defendants about their monthly gross income. Further, plaintiffs' apparent supposition is that defendants, having chosen to set the TPP payment based on its understanding of plaintiffs' stated income instead of the documents plaintiffs provided, became obligated to make a permanent loan modification offer based on the understated income figure on which they had based the TPP.

We affirm the trial court's grant of summary judgment. The two-step process set forth in the TPP agreement and HAMP regulations does not require banks and loan servicing companies to engage in income verification by obtaining and reviewing borrowers' financial documents at the first (TPP) stage of the loan modification process. Rather, the agreement and regulations explicitly contemplate reliance on borrowers' *stated* gross monthly income amounts to set the TPP, followed by a second stage in which the mortgage servicer or bank *verifies* such amounts thereafter. Thus, by offering plaintiffs a TPP based on partial (and as it turned out, incorrect) information, defendants

did not breach any obligation to plaintiffs. Further, by offering a permanent mortgage modification with higher monthly mortgage payments, based on verified income information obtained from the documentation plaintiffs provided, defendants did precisely what HAMP requires them to do. Finally, plaintiffs have failed to provide evidence showing defendants made any misstatements in the TPP agreement or that plaintiffs reasonably relied on any oral statements made by defendants' representatives. For these reasons, defendants were entitled to judgment on all of plaintiffs' contract-based and related causes of action, and we therefore affirm the judgment.

BACKGROUND

I.

Plaintiffs' Complaint

In December 2014, plaintiffs filed a first amended complaint against Chase and EMC,¹ asserting five causes of action: breach of contract, declaratory relief, violation of the "California Fair Debt Collection Practices Act" (Civ. Code, § 1788, et seq.), breach of the covenant of good faith and fair dealing and promissory estoppel. Plaintiffs alleged they owned real property in San Mateo, California (property). In 2005, the Sevillas, who are siblings,² entered into a mortgage loan secured by a deed of trust on the property (loan). Chase eventually became the beneficiary of the deed and was represented by EMC as the servicer of the loan.

Plaintiffs alleged in their breach of contract cause of action that at some time before March 2, 2010, they defaulted on their mortgage loan and began discussing with

¹ The complaint focuses on alleged conduct and statements of EMC. The allegations against Chase are, in essence, that Chase had acquired EMC and that EMC acted on Chase's behalf in communicating with plaintiffs about and taking actions regarding the loan modification.

² According to Aminta Sevilla, the third plaintiff, Antonio Uribe, is her husband and a co-owner with her and her brother of the property that is secured by the loan. Plaintiffs alleged the Sevillas were the parties to the subject loan, and the original and modified mortgage payments were based on the Sevillas' combined monthly income. For convenience, we refer to "plaintiffs" without distinguishing between them even though the acts and communications we discuss were between the Sevillas and defendants, and Uribe does not appear to have played any active role in them.

EMC entering into a loan modification agreement under HAMP. Plaintiffs further alleged that under HAMP, defendants, upon approving a three-month trial period plan, i.e., a TPP, for a borrower, were required to offer a permanent loan modification if the borrower complied with the terms of the written TPP agreement and made representations that remained true and correct. The modification would become effective on the first day of the fourth month.

Plaintiffs alleged that before March 2, 2010, they provided all the information and documents EMC requested. EMC determined that plaintiffs' application for a loan modification was complete and it analyzed, along with Chase, the information and documents provided. EMC prepared a written agreement dated March 2, 2010, to which the parties agreed. This agreement required monthly mortgage payments of \$2,028 to Chase during a three-month trial period. Plaintiffs were told in writing, "After all the trial period payments are timely made and you have submitted all the required documents, your mortgage would then be modified if you qualify." The agreement and HAMP required "a Servicer . . . to offer a permanent loan modification after a borrower's successful TPP upon terms and conditions similar to the terms and conditions of the TPP."

Plaintiffs alleged they made all trial period payments on time and "submitted all the required documents and information prior to March 2, 2010, to EMC and Chase." Accordingly, they qualified for the permanent loan modification. Further, "[p]rior to entering into the [a]greement, Plaintiffs provided written proof of income and EMC verified Plaintiffs' income and there was no change in Plaintiffs' income or source of income during the Trial Period or at any relevant time thereafter. [¶] EMC and Chase's decision to enter into a TPP with Plaintiffs was based upon verified income documentation."

According to plaintiffs, EMC and Chase accepted their monthly payments until December 2010, when they breached their written TPP agreement by refusing "to provide a permanent loan modification to Plaintiffs under terms and conditions similar to the terms and conditions of the TPP." Plaintiffs alleged as damages the difference between

their original monthly mortgage payments (more than \$4,500) and their TPP monthly payments (\$2,028) from December 2011 to the end of the term of the loan and alleged unspecified damages for decreases in their credit ratings.

In their declaratory relief cause of action, plaintiffs, based on their interpretation of the TPP agreement, sought a declaration that their loan was permanently modified to require EMC and Chase to accept monthly mortgage payments of \$2,028.

In their California Fair Debt Collection Practices Act cause of action, plaintiffs alleged EMC and Chase failed to act in good faith by promising a permanent loan modification on terms and conditions similar to the TPP and not fulfilling their promise and engaged in deceptive and harassing practices. Plaintiffs sought unspecified damages, statutory damages and attorney fees.

In their breach of the covenant of good faith and fair dealing cause of action, plaintiffs alleged EMC and Chase gave them false information about the loan, the agreement and how to contest the loan's terms and claimed to have lost documents and information plaintiffs had sent to them. Also, several defendant representatives promised plaintiffs that, upon the Sevillas' successful completion of the TPP, they "would receive a permanent loan modification with monthly payments similar to the payments under the TPP." EMC and Chase did not provide a permanent loan modification with monthly payments similar to the TPP payments, thereby breaching their covenant of good faith and fair dealing, for which plaintiffs sought unspecified damages.

In their promissory estoppel cause of action, plaintiffs alleged EMC and Chase were estopped from denying oral promises to provide a permanent loan modification with monthly mortgage payments similar to the TPP payments. Plaintiffs claimed they justifiably relied on these promises and refrained from seeking other financial relief. They sought "enforcement of the promises."

II.

The Court Grants Defendants' Motion for Summary Judgment.

A. Defendants' Motion

Defendants moved for summary judgment. They asserted in their separate statement of undisputed facts, based on supporting evidence, that in June 2009, plaintiffs submitted a loan modification request stating plaintiffs had a combined monthly income of \$7,200.³ On March 2, 2010, EMC sent plaintiffs a written offer “to enter into a trial period plan” under HAMP. The document, which we will refer to as “the TPP agreement,” informed plaintiffs that the TPP was “the first step toward qualifying for more affordable mortgage payments.” It explained that, to accept this “offer,” plaintiffs were required to make three monthly mortgage payments in the amount of \$2,028.02 by the first day of April, May and June 2010 respectively. EMC based the TPP payment amount on plaintiffs’ “stated income” and did not verify plaintiffs’ income when it made the TPP offer.

Page 3 of the TPP agreement listed “Frequently Asked Questions,” including “How was my new payment in the trial period determined?” The answer to that question explained, “Your trial period payment is approximately 31% of your total gross monthly income, which you told us was **\$6,542.00**. During your trial period the interest rate on your loan we remain [*sic*] unchanged. If we modify your loan permanently after the trial period, the interest rate may be different due to a variety of factors.” (Bold in original.) In response to the question, “Why is there a trial period?” the TPP agreement explained, “The trial period offers you immediate payment relief (and could prevent a foreclosure sale) while we process your paperwork to determine if you qualify for a permanent loan modification. It also gives you time to make sure you can manage the lower monthly mortgage payment.” And in response to the question, “What happens if my verified

³ This document, which appears to be an EMC form, refers to “monthly net income” rather than “gross” income. Another request for modification and affidavit plaintiffs submitted later in March or April 2010 states their monthly “Total (Gross Income)” was \$7,278.

income is different from the amount I told you verbally?” the TPP agreement stated, “During the trial period, we will verify your income based on the documentation you must provide. Your verified income will determine your eligibility for a permanent modification and its final terms. If your verified income is significantly higher than the income you told us, you may have to restart your trial period with a higher payment based on that higher income. Also, if your verified income is different from the amount you gave us verbally, you may no longer be eligible for a Home Affordable Modification.” Finally, as relevant here, the TPP Agreement answered the question, “When will I know if my loan can be modified permanently and how will the modified loan balance be determined?” with the following statement, “Once we confirm you are eligible for a Home Affordable Modification and you make all of your trial period payments on time, we will send you a modification agreement detailing the terms of the modified loan. Any difference between the amount of the trial period payments and your regular monthly mortgage payments will be added to the balance of your loan along with any other past due amounts as permitted by your loan documents. While this will increase the total amount that you owe, it should not significantly change the amount of your modified mortgage payment as that is determined based on your total monthly gross income, not your loan balance.”

The TPP agreement contains a checklist of actions consisting of making the first monthly TPP payment and providing “information we need to help you modify your mortgage payments.” It also includes signing and dating “the enclosed MHA⁴ Request for Modification & Affidavit,” an IRS form enabling EMC to obtain plaintiffs’ tax return transcripts. And it lists the “required income documentation,” which includes copies of pay stubs; bank statements (for self-employed borrowers); copies of the most recent tax returns for borrowers who had rental income; and documentation of any “non-wage

⁴ MHA apparently refers to a program of the Treasury Department entitled, “Making Home Affordable” of which HAMP is a part. The record does not reflect this, but we surmise it is the case. (See <<http://www.treasury.gov/initiatives/financial-stability/TARP-programs/housing/MHA/pages/default.aspx>> [as of Apr. 26, 2019].)

income” including “part time employment.” The TPP agreement states that if this documentation is not provided “on time, **we will not be able to determine if you qualify for the [HAMP]**” and that, “[i]n addition to making your trial period payments on time, you must send copies of all the documents that are noted on the attached checklist no later than **APRIL 01, 2010** so that we can verify the financial information you already provided to us **If the documents are not received by APRIL 01, 2010, this offer will end and your loan will not be modified.** [¶] After all trial period payments are timely made and you have submitted all the required documents, your mortgage would then be permanently modified if you qualify.” (Bold in original.)

Plaintiffs accepted the TPP and made payments from April 2010 through December 2010. On April 2, 2010, the Sevillas faxed certain documents to EMC. These included a form request for modification and affidavit stating plaintiffs’ monthly “Total (Gross Income)” was \$7,278. (See fn. 3, *ante.*)⁵ However, it also included documents indicating plaintiffs had a gross monthly income substantially higher than that amount and higher than the stated income of \$6,542 defendants used to determine the TPP monthly payment of \$2,028. Specifically, paystubs for Abraham Sevilla showed his monthly gross wages were at least \$7,241 and paystubs for Aminta Sevilla showed her monthly wages were about \$2,800. Additional documents later provided to defendants showed Abraham was in the Army Reserves and received approximately \$577 per month for that service. Based on these documents, and for purposes of their motion only, defendants conservatively estimated plaintiffs’ gross monthly income was, at minimum,

⁵ The Sevillas acknowledged that the information they provided in the form was “truthful” and signed it under penalty of perjury. The document warned that their loan modification could be canceled if they made any misrepresentation of fact, that EMC would “use the information in this document” to evaluate their eligibility for a loan modification and that EMC was not obligated to offer them assistance based solely on their representations.

\$9,825.⁶ Documents plaintiffs submitted later during the trial period covering certain months in 2010 showed an even higher income.

Defendants asserted that plaintiffs failed to send all the required documentation by April 1, 2010, as required by the TPP Agreement. The evidence they cited, at best, indirectly supports that proposition, but it does show plaintiffs submitted a significant volume of financial documents on dates after April 1, 2010. This includes paystubs faxed to EMC on April 2, 2010, additional paystubs faxed on June 29, 2010, and a 2009 tax return faxed on September 24, 2010. The defendants did not contend that EMC ever suggested to plaintiffs it was suspending the permanent loan modification process because plaintiffs had not timely provided information that was requested. On the contrary, even though the TPP required the plaintiffs to submit all documentation by April 1, 2010, EMC continued to request documentation from plaintiffs thereafter until, in December 2010, it sent them a permanent loan modification proposal.

On December 3, 2010, EMC sent plaintiffs a final loan modification offer. The monthly principal and interest payment of \$3,257 was based on plaintiffs' higher verified income rather than plaintiffs' stated income, as the TPP agreement stated it would be. Defendants' underwriting personnel arrived at an income amount and then adjusted the monthly payment to approach the target of 31 percent of gross income. The monthly gross income amount defendants determined from the documents was approximately \$13,000. The terms of the offer also required plaintiffs to make a monthly escrow payment of \$425 beginning on February 1, 2011, for insurance premiums and property taxes. This offer would have reduced plaintiffs' monthly principal and interest payments by over \$800 from the payments under the original loan and reduced the interest rate for the loan from 8.650 percent to 5.025 percent. The Sevillas rejected this proposed modification.

⁶ It is unclear how defendants arrived at this figure, but it is considerably less than the sum of the three income figures (\$10,618).

B. Plaintiffs' Opposition

In their opposition to defendants' motion, plaintiffs objected to much of defendants' evidence. We presume these objections were overruled because the trial court did not explicitly rule on them. (*Reid v. Google* (2010) 50 Cal.4th 512, 534.) Plaintiffs could have renewed any objections on appeal but did not, and we therefore do not consider them. (See *ibid.* ["presumptively overruled objections can still be raised on appeal, with the burden on the objector to renew the objections in the appellate court"].)

Plaintiffs otherwise relied in their opposition on declarations by Abraham Sevilla and Aminta Sevilla⁷ to dispute some of defendants' stated facts. Abraham stated his monthly income as a reservist was only \$323, not \$577, and his income as a police officer was substantially the same in 2009 and 2010, with certain "peaks" for mandatory overtime work he performed. He attached and authenticated documents supporting these statements.⁸

Aminta stated she applied for a loan modification in 2009. Prior to March 2, 2010, she provided EMC with tax returns, bank statements, a hardship letter with financial information, W-2 forms showing her and Abraham's income for 2009 and the first months of 2010 and her pay checks from May 2009 to February 25, 2010. She stated the W-2 forms showed Abraham's income for 2009 was \$92,066 (an average of \$7,672 per month) and for the first months of 2010 averaged \$6,800.86 per month and her income for 2009 was \$30,504 (an average of \$2,542 per month) and for the first months of 2010 averaged \$2,880 per month. The declaration does not attach any tax returns or W-2 forms reflecting the above amounts or otherwise, or any tax returns or W-2 forms sent to EMC prior to March 2. Rather, the documents she attaches as Exhibit 1 and describes as "the documents provided to EMC prior to March 2, [2010]" consist of bank statements, executed IRS forms requesting transcripts of tax returns and a June 24, 2009 letter

⁷ In discussing these declarations, we refer to each of the Sevillas by first name for clarity's sake and mean no disrespect in doing so.

⁸ The W2 forms actually showed his 2010 wages from his primary employment were about \$15,000 higher than his 2009 wages, these wages being \$107,240 and \$92,066, respectively.

plaintiffs sent to EMC seeking assistance with their mortgage. However, plaintiff attached to her declaration a list of the paystubs she provided EMC, broken down by the date on which she provided them. The list indicates that before receiving the TPP agreement, she submitted pay stubs for herself for the period from June 29, 2009, through February 28, 2010, and submitted pay stubs for Abraham for the period from April 27, 2009, through February 14, 2010.

Aminta's declaration also stated that "subsequent to March 2, 2010, during the trial period," she provided EMC with pay checks for the period from March 5, 2010, to June 29, 2010, bank statements from various months, a tax return for "2008/2009", and W-2 forms with the additional information that indicated her 2010 gross income was \$37,520 (\$3,126 per month on average) and Abraham's income was \$111,122 (\$9,260 per month on average). She did not attach these documents to her declaration or otherwise indicate when she sent them to EMC. However, the attached list of pay stubs she submitted to EMC for Abraham and herself reflects that the documents submitted after they entered the TPP agreement were for checks dated after March 2, 2010.

Aminta further stated that "[t]he information and documents that I provided to EMC prior to March 2 and after March 2, [2010], show[ed] the same amount of combined income." She declared, "The combined monthly income declared to EMC before March 2, 2010, was \$10,171.64 and our income did not substantially change after March 2, 2010. After March 2, 2010, our combined monthly income was, as an average, \$10,470.50. I informed EMC's representative about the monthly income and provided EMC, via fax, with all supporting documents that EMC requested before March 2 and after March 2, 2010, within the time frame that the representative requested." Any fluctuation in her monthly income was because in 2009 and 2010, she derived her income from preparing tax returns and received most of it around April and October of each year. Aminta further stated that she faxed documents to EMC "many times" because EMC employees claimed they were unable to find documents or that they had been lost. She attached some, but not all, the documents she sent EMC because she could not locate some of the documents.

Furthermore, Aminta stated, two different EMC representatives told her in two different phone calls, which occurred on March 17 and 19, 2010, respectively, that the Sevillas would receive a permanent loan modification offer for monthly payments similar to their TPP payment. According to Aminta, the representative in the second phone call conditioned this promise on the Sevillas' "successful completion of the TPP."

According to Aminta, during the three-month trial period, all documents EMC requested from her and Abraham "were faxed to EMC. Documents were faxed many times as I was informed by EMC employees that the documents could not be found or had been lost. As a result, documents were faxed several times prior and after April 1, 2010." She attached only "some" of these documents to her declaration because all had "not been located."

Aminta also stated that she timely made each monthly payment during the trial period and thereafter until December 2010, when Chase refused to accept the Sevillas' monthly mortgage payments. She further stated, "Based upon statements made by EMC's employees and representations, and the fact that we had made all the payments required by the TPP in full and on time . . . and based upon the fact that there was no substantial difference between our income prior to and after March 2, 2010, I truly believed that the permanent financing would be approved. As a result, I did not seek other alternatives such as attempting to obtain a loan from a different lender."

C. The Court's Ruling

The court granted defendants' motion for summary judgment at the end of the hearing on the motion. The court also issued a written minute order granting defendants' motion.

III.

Plaintiffs' Notice of Appeal

Plaintiffs filed a notice of appeal from the court's order granting defendants' motion for summary judgment within 60 days of that ruling. Although the record does not contain a written order granting summary judgment or a judgment, defendants represent that the court issued a written order granting summary judgment and a further

written order dismissing the case shortly after plaintiffs filed their notice of appeal. We liberally construe the court's minute order granting summary judgment as incorporating an appealable judgment, and the notice of appeal as appealing from such judgment. (*Levy v. Skywalker Sound* (2003) 108 Cal.App.4th 753, 761, fn. 7.)

DISCUSSION

Plaintiffs argue the trial court erred in granting defendants' motion for summary judgment and that there are triable issues of material fact regarding each of their causes of action. We begin with the standard of review we apply to a grant of summary judgment and then a brief discussion of HAMP.

I.

Summary Judgment

"Our review of a judgment based upon a grant of summary judgment is de novo. As in the trial court, the moving party's papers are strictly construed and the opposing party's are liberally construed. All doubts as to the propriety of granting the motion—i.e., whether there is any issue of triable fact—are to be resolved in favor of the party opposing the motion. [Citation.] We independently determine the construction and effect of the facts presented to the trial judge as a matter of law." (*Zack's, Inc. v. City of Sausalito* (2008) 165 Cal.App.4th 1163, 1174.)

Summary judgment is appropriate where "all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) A defendant seeking summary judgment "bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 (*Aguilar*).) "A prima facie showing is one that is sufficient to support the position of the party in question. [Citation.] No more is called for." (*Id.* at p. 851.) California law requires that "a defendant moving for summary judgment . . . present evidence, and not simply point out that the plaintiff does not possess, and cannot reasonably obtain, needed evidence." (*Id.* at p. 854, fn. omitted.)

“The pleadings delimit the issues to be considered on a motion for summary judgment. [Citation.] The defendant must present facts to negate each claim as framed by the complaint or establish a defense. Only when this prima facie showing is made must the plaintiff demonstrate the existence of a triable, material issue.” (*Turner v. State of California* (1991) 232 Cal.App.3d 883, 891.)

If the moving party “carries his burden of production, he causes a shift, and the opposing party is then subjected to a burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact.” (*Aguilar, supra*, 25 Cal.4th at p. 850.) “There is a genuine issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof.” (*Id.* at p. 845.)

II.

HAMP

Two cases, *Bushell v. JPMorgan Chase Bank, N.A.* (2013) 220 Cal.App.4th 915, 923 (*Bushell*) and *West v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 780, 787–788 (*West*), explain the purpose of HAMP and discuss HAMP regulations that were in place in 2009 and 2010, the period when the parties in this case discussed and entered into the TPP and defendants offered plaintiffs a permanent loan modification.

The U.S. Treasury Department adopted HAMP in the wake of the 2008 financial meltdown “to induce lenders to refinance mortgages to reduce monthly payments for struggling homeowners.” (*Bushell, supra*, 220 Cal.App.4th at p. 923.) “HAMP enables certain homeowners who are in default or at imminent risk of default to obtain ‘permanent’ loan modifications, by which their monthly mortgage payments are reduced to no more than 31 percent of their gross monthly income for a period of at least five years.” (*Ibid.*) The Treasury Department regulation known as [U.S. Dept. Treasury HAMP] Supplemental Directive 09-01 [Apr. 6, 2009 (Supplemental Directive 09-01)] set forth HAMP’s eligibility requirements and modification procedures, and lenders were

required to perform loan modifications in accordance with that and other Treasury regulations. (*Ibid.*)

Bushell further explains, “[a]s for HAMP’s eligibility requirements, under Supplemental Directive 09-01, before a lender offers a TPP to a distressed borrower, the lender (1) has already found that the borrower satisfies certain simple threshold requirements under HAMP regarding the basic nature of the loan obligation (e.g., a certain loan amount balance; property is primary residence; monthly mortgage payment greater than 31 percent of monthly gross income); (2) has already calculated a trial modification payment amount using a ‘waterfall’ method of specified steps that drops the borrower’s monthly mortgage payment to the HAMP target figure of 31 percent of monthly gross income; and (3) most significantly from the lender’s perspective, has already determined, pursuant to application of a net present value (NPV) test based in part on income/financial representations provided by the borrower, that it is more profitable to modify the loan under HAMP than to foreclose upon it. (*West, supra*, 214 Cal.App.4th at pp. 787–788; *Wigod [v. Wells Fargo Bank, N.A.* (7th Cir. 2012) 673 F.3d 547,] 556–557, 565 [(*Wigod*)]]; Supplemental Directive 09-01, *supra*, pp. 2–5, 8–10, 14–18; see Supplemental Directive 09-01, p. 4 [‘If the NPV result for the modification scenario is greater than the NPV result for no modification, . . . the [lender] MUST offer the modification,’ even if a third party investor is involved (original capitalization)]; see Chiles & Mitchell, [HAMP: An Overview of the Program and Recent Litigation Trends (2011)] 65 Consumer Fin. L.Q. Rep. [194,] 194–197.) Furthermore, Supplemental Directive 09–01 specifies that, upon receiving the signed TPP from the borrower (with the income verification documents), the lender ‘must confirm’ that the borrower continues to meet these HAMP eligibility criteria and, if not, the lender ‘should promptly communicate’ that fact in writing to the borrower ‘and consider the borrower for another foreclosure prevention alternative.’ (Supplemental Directive 09-01, *supra*, p. 15.)” (*Bushell, supra*, 220 Cal.App.4th at pp. 923–924.)

“After determining a borrower qualifies under HAMP in this manner, the lender implements the HAMP modification process in two steps.

“In step one, the lender (1) provides the borrower with a TPP that sets forth the trial payment terms the lender has calculated using the waterfall method; (2) instructs the borrower to sign and return the TPP, a financial hardship affidavit, and income verification documents (if not previously obtained from the borrower); and (3) requests the first trial payment. [Citations.]

“As for step two of the HAMP modification process, after the trial period, if the borrower has complied with all terms of the TPP—including making all required trial payments and providing all required documentation—and if the borrower’s representations on which modification is based remain true and correct, the lender ‘must offer’ the borrower a permanent loan modification (in step two, the lender calculates the terms of the permanent modification using the verified income information). [Citations.]

“This ‘must offer’ mandate is because, as *West* explains, citing *Wigod*, ‘When [a lender] received public tax dollars under [TARP], it agreed to offer TPP’s and loan modifications under HAMP according to [regulations] . . . issued by the Department of the Treasury. (*Wigod, supra*, 673 F.3d at p. 556.) Under . . . [the] HAMP [S]upplemental [D]irective 09-01 [regulation] . . . , if the lender approves [(i.e., offers)] a TPP, and the borrower complies with all the terms of the TPP and all of the borrower’s representations remain true and correct, the lender *must offer* a permanent loan modification. (*Wigod, supra*, at p. 557.) [Supplemental] Directive 09-01, *supra*, at page 18, states: “If the borrower complies with the terms and conditions of the [TPP], the loan modification will become effective on the first day of the month following the trial period” ’ (*West, supra*, 214 Cal.App.4th at pp. 796–797, fn. omitted.)” (*Bushell, supra*, 220 Cal.App.4th at pp. 924–925, fns. omitted.)

A TPP agreement for a trial loan modification under HAMP is an enforceable written contract. (*West, supra*, 214 Cal.App.4th at p. 796.) Banks that enter such an agreement are obligated to offer loan modifications “according to guidelines, procedures, instructions, and directives issued by the Department of the Treasury. [Citation.] Under . . . Supplemental Directive 09-01 . . . , if the lender approves a TPP, and the borrower complies with all the terms of the TPP and all of the borrower’s representations

remain true and correct, the lender *must offer* a permanent loan modification. [Citation.] [Supplemental] Directive 09–01, *supra*, at page 18, states: ‘If the borrower complies with the terms and conditions of the [TPP], the loan modification will become effective on the first day of the month following the trial period. . . .’ ” (*West, supra*, 214 Cal.App.4th at p. 797.)

III.

Analysis

A. The Breach of Contract, Declaratory Relief and Bad Faith Causes of Action

“The elements of a cause of action for breach of contract are well known. A plaintiff must establish: the existence of a contract, plaintiff’s performance (or excuse for non-performance), defendant’s breach, and resulting damages.” (*Professional Collections Consultants v. Lujan* (2018) 23 Cal.App.5th 685, 690.) There is no dispute that the parties entered into the TPP Agreement.

In their motion for summary judgment, defendants sought to show that plaintiffs could not establish that they had complied with all terms of the TPP agreement or that defendants had breached it. Defendants alluded to plaintiffs’ non-performance; they conceded plaintiffs made the required monthly payments under the TPP but contended plaintiffs failed to timely submit all required documentation. Defendants do not raise this non-performance issue in response to plaintiffs’ appeal. Regardless, there is at least a triable issue of fact on that point in that it appears defendants excused any such non-performance, and we cannot therefore affirm on that ground. Defendants’ contention that plaintiffs could not establish a breach—an argument they reiterate on appeal—presents a more complicated question, to which we now turn.

Defendants contend it is undisputed that plaintiffs represented they had a monthly income of \$7,278 or less, before providing all the financial documents required by the TPP, which was less than the income their financial documentation demonstrated they had; the TPP monthly payment amount was based on plaintiffs’ stated income, and not on their verified income; plaintiffs’ stated income did not remain true and correct in that

their verified combined income for 2009 and 2010, excluding Abraham's military pay and plaintiffs' rental income, was conceded to be \$122,570 for 2009 and \$148,642 for 2010, "which equates to average monthly income of \$11,300"; that defendants made a permanent loan modification offer to plaintiffs of approximately 31 percent of plaintiffs' verified monthly income, consistent with HAMP requirements; and that the TPP agreement stated that during the trial period EMC would verify plaintiffs' income based on the documents plaintiffs provided and that verified income would determine the terms of any permanent modification. According to defendants, because they made a permanent loan modification offer that was consistent with the TPP agreement, they did not breach the agreement.

Plaintiffs challenge defendants' argument on multiple grounds. First, they contend they disclosed to defendants before the trial period commenced on March 2, 2010, an income that remained essentially the same as the income reflected by the documents they submitted to defendants during the trial period. Relatedly, plaintiffs contend defendants failed to show they orally represented that their income was \$6,542, noting that "[t]he only document produced by Defendants showing that Plaintiffs allegedly stated that their gross income was \$6,542.00 is found on page 3 of the [TPP] Agreement, under the heading 'Frequently Asked Questions.' " Further, the June 25, 2009 document plaintiffs submitted to defendants, in which, defendants claim, plaintiffs represented their income was \$7,200, stated this amount was their "net income," not gross income, and this amount was consistent with income reflected in other documents they submitted. Based on these assertions, plaintiffs contend there are triable issues of fact that preclude summary resolution of their contract cause of action.⁹

⁹ Plaintiffs also contend defendants were not permitted to consider information about income defendants received after the trial period ended on June 30, 2010, by extending the TPP through December of that year; otherwise lenders could avoid complying with HAMP by continuing to extend the TPP and then denying or changing terms of the loan modification based on later changes in a borrower's income. However, because income documentation and information plaintiffs submitted during the trial period indicating they had a gross monthly income that was substantially higher than the

As to plaintiffs' first factual contention, that they provided documentation accurately indicating their income prior to March 2, 2010, we agree there is at least a triable issue. Aminta's declaration lists documents she provided to EMC before March 2, 2010, including tax returns, pay stubs, W-2 forms, bank statements and a hardship letter. We also agree with plaintiffs that defendants did not establish that plaintiffs represented their gross income was \$6,542 or \$7,200 before March 2, 2010. None of defendants' declarations described any oral conversation in which plaintiffs so stated, and the June 2009 document on which defendants rely stated only that plaintiffs' "*net income*" was \$7,200 and made no representation about their gross income. And even if defendants had met their prima facie burden as to the purported oral representation by relying on a TPP agreement that referred to plaintiffs' stated income,¹⁰ plaintiffs raised a triable issue as to whether they made any such representation. In her deposition, Aminta denied having calculated the \$6,542 number defendants referred to in the TPP agreement.

Assuming, as we must, that plaintiffs did not represent that their gross income was \$6,542 or any similar amount, that they submitted the documents described in Aminta's declaration before defendants determined the TPP payment amount, and that if defendants had reviewed those documents they could have determined plaintiffs' combined gross income was more than \$10,000 per month and based the TPP amount on that income, several legal issues remain that may be determinative. In other words, the

"stated income" defendants relied on in setting the TPP monthly payment, and because plaintiffs assert only that they had the contractual right to a permanent loan modification with a monthly payment similar to the TPP payment, we have no need to consider this additional argument.

¹⁰ Defendants also rely on a document in which plaintiffs listed \$7,278 as their "Monthly Gross Wages" and their "Total (Gross Income)." That document, which was signed on March 17, 2010, appears to have been faxed to EMC on April 2, 2010—a month after EMC sent the TPP offer to plaintiffs. However, this representation is not material to the parties' dispute regarding defendants' calculation of the TPP payment for the obvious reason that defendants set the TPP payment amount on or prior to March 2, 2010, and do not claim to have relied on this April 2, 2010 faxed document in setting that amount.

facts plaintiffs dispute may not necessarily be material to the resolution of the breach of contract claim.

The first such legal issue is whether EMC was required by the TPP agreement to review the documentation and verify plaintiffs' income prior to determining the TPP payment. It is undisputed that EMC did not do so. Contrary to plaintiffs' premise, the TPP agreement did not require EMC to do so. Rather, the agreement stated that the temporary payment plan afforded plaintiffs "immediate payment relief" while EMC "process[ed] [their] paperwork to determine if [they] qualif[ied] for a permanent loan modification." It advised plaintiffs that the TPP was temporary and explained how the TPP payment was calculated. The agreement also indicated that "[d]uring the trial period, we will verify your income based on the documentation you must provide" and that "[y]our verified income will determine your eligibility for a permanent modification and its final terms." (Italics added.) Nothing in the agreement stated EMC was required to review the documents plaintiffs submitted or to verify the accuracy of their income prior to establishing the TPP. Nor do plaintiffs point to anything in the Supplemental Directive 09-01 that required such pre-TPP verification at the time their request for modification was being processed. On the contrary, the version of the directive in effect at the time, which is contained in the record as an attachment to plaintiffs' complaint, stated that "[s]ervicers may use recent verbal financial information obtained from the borrower and co-borrower 90 days or less from the date the servicer is determining HAMP eligibility to assess the borrower's eligibility. The servicer may rely on this information to prepare and send to the borrower a solicitation for the HAMP and an offer of a Trial Period Plan." Only "[w]hen the borrower returns the Trial Period Plan and related documents" must the servicer "review them to verify the borrower's financial information and eligibility."¹¹

¹¹ Effective June 1, 2010 (three months after EMC offered plaintiffs the TPP), the Treasury Department's revised directive required lenders to fully verify a borrower's financial information before offering a TPP. (*Bushell, supra*, 220 Cal.App.4th at p. 924, fn. 4.)

The second legal issue raised by plaintiffs’ theory is whether, assuming defendants erroneously interpreted something plaintiffs said or wrote to mean their gross monthly income was \$6,542 and used that amount in determining the TPP payment, defendants became legally bound to offer plaintiffs a permanent loan modification based on that number. Again, nothing in the TPP agreement so stated. The agreement plainly stated the TPP payment was about 31 percent of a total monthly gross income “you told us was **\$6,542.**” If defendants erred in their statement about what plaintiffs told them, plaintiffs were fully advised of the error. Further, the agreement stated the TPP payment amount was “temporary” and that “[y]our *verified income* will determine your eligibility for a permanent modification *and its final terms.*” (Italics added.) Nor did the law governing HAMP require EMC to offer plaintiffs a permanent loan modification based on an erroneous and unverified income amount once EMC had determined that their verified income was significantly higher. Rather, Supplemental Directive 09-01 provided, “In step two, servicers *must calculate the terms of the modification using verified income*, taking into consideration amounts to be capitalized during the trial period.” (Italics added.) It further provided, “because the monthly payment under the [permanent loan modification] Agreement will be based on verified income documentation, the monthly payment due under the Agreement may differ from the payment amount due under the Trial Period Plan.”

In the end, plaintiffs’ theory that if they complied with the requirements of the TPP and did not misrepresent their income they were entitled to a permanent loan modification on terms similar to the TPP rather than based on their verified income is incorrect. Under the TPP agreement and Supplemental Directive 09-01, defendants were entitled to offer a permanent modification with a payment amount based on plaintiffs’ verified income. Plaintiffs do not dispute that their verified income was significantly higher than the income on which EMC based the TPP agreement’s monthly payment.¹²

¹² Aminta’s declaration states plaintiffs’ combined monthly income before March 2, 2010, was \$10,171.64 and after March 2, 2010, was \$10,470.50—figures that substantially exceed \$6,542.

Thus, defendants did not breach the TPP agreement by failing to offer them a permanent loan modification based on the TPP's lower amount. Without a breach, plaintiffs' first cause of action fails and summary judgment as to that claim was proper.

The same is true of plaintiffs' second and third causes of action. The second cause of action, for declaratory relief, is based on the same theory as their contract cause of action. The fourth cause of action, for breach of the covenant of good faith and fair dealing, is similarly predicated on defendants' failure to offer them a permanent modification on terms similar to the TPP. Defendants were entitled to summary judgment on this claim because (1) an implied covenant cannot create obligations not contemplated in the contract (*Racine & Laramie, Ltd. v. Dept. of Park & Recreation* (1992) 11 Cal.App.4th 1026, 1032), and (2) the failure to offer a permanent modification on the same terms as the TPP was not a breach.

B. The Remaining Causes of Action

Plaintiffs also alleged that defendants violated the California Fair Debt Collection Practices Act (Civ. Code, § 1788 et seq.) by, as plaintiffs summarize them, making false promises and deceptive statements about permanent financing and preventing plaintiffs from pursuing other financing options. The purpose of this Act, also known as the Rosenthal Act, is to "prohibit debt collectors from engaging in unfair or deceptive acts or practices in the collection of consumer debts, and to require debtors to act fairly in entering into and honoring such debts." (Civ. Code, § 1788.1, subd. (a)(2).)

Defendants contended in their summary judgment motion that plaintiffs could not raise a triable issue of material fact regarding this cause of action because they were not told anything that was objectively misleading.

In opposition, plaintiffs offered Aminta's statements in her declaration that she was twice promised verbally by defendants' representatives in March 2010 phone calls that plaintiffs would receive a permanent loan modification offer with a mortgage payment amount similar to the TPP amount.

Plaintiffs' contentions failed to raise a triable issue of material fact. The general statements Aminta described in her declaration, in the context of the TPP agreement

plaintiffs had previously received, were not misleading. Given that the agreement stated the TPP payment was based on a gross income figure much lower than the gross income Aminta knew she and Abraham earned, and that it stated any permanent loan payment would be based on “verified income documentation” and could be different from the TPP amount, the oral statements could not reasonably have been understood as unconditional promises. This is especially so because, by Aminta’s own account, these statements were made in mid-March 2010, which was prior to the date plaintiffs were required to submit all the income documentation required by the TPP.

Plaintiffs’ promissory estoppel cause of action is based on these same general oral statements by EMC representatives. “The elements of promissory estoppel are (1) a clear and unambiguous promise by the promisor, and (2) reasonable, foreseeable and detrimental reliance by the promisee.” (*Bushell, supra*, 220 Cal.App.4th at p. 929.) For the reasons just discussed, plaintiffs did not raise a triable issue that EMC representatives made a “clear and unambiguous” promise. And, even if the statements could be viewed as promises, plaintiffs cannot show any reliance on them was reasonable in light of the provisions of the TPP agreement. Plaintiffs’ reliance on *Bushell* is misplaced. There, the TPP agreement itself contained a clear and specific promise, and plaintiffs did not claim to have relied on general oral statements that were inconsistent with the TPP agreement. (*Id.* at p. 930; see also *id.* at pp. 921–922.) Here, the trial court did not err in granting defendants’ summary judgment motion on the promissory estoppel cause of action.

In the end, at best this is a case of borrowers who were informed a mistake had been made and failed to address it, possibly because they didn’t read the TPP agreement or perhaps because they hoped the mistake would redound to their long-term benefit. Plaintiffs should have read the TPP agreement and noticed the understatement of their combined gross income. Regardless, they were not contractually or otherwise entitled to a long-term advantage from any such mistake, even if the mistake was entirely the fault of EMC.

That said, plaintiffs *did* obtain considerable advantage from EMC’s mistake. For nine months, from April 2010 through December 2010, they remained in their home

while making mortgage payments that were less than 31 percent of their income and less than half the \$4,500 amount their loan documents required them to pay. After December 2010, EMC did not accept any mortgage payments from plaintiffs, although plaintiffs initially tendered payments in the same amount as required by the TPP. Yet neither defendants nor any subsequent purchasers of the mortgage sought to foreclose for at least seven years thereafter. Plaintiffs presumably had use of the property during that period without having to pay any mortgage. They received more than they were due.

DISPOSITION

The judgment is affirmed. Defendants shall recover their costs on appeal.

STEWART, J.

We concur.

KLINE, P.J.

MILLER, J.

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